Editor's note: appeal filed, Civ.No. 94-Z-2463 (D. Colo. Oct. 28, 1994)

KERR COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-779 Decided September 28, 1994

Appeal from a decision of Administrative Law Judge Ramon M. Child denying an application for temporary relief from a notice of violation.
DV-94-12-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Federal Lands: Cooperative Agreements--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Applications--Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

Where language in a cooperative agreement between Colorado and OSM governing surface mining regulation on Federal lands clearly indicates that OSM may take Federal enforcement action pursuant to the Federal lands program, 30 U.S.C. § 1273 (1988), an appeal of an Administrative Law Judge's denial of an application for temporary relief based upon arguments that state enforcement procedures and the state's interpretation of whether appellant is in substantial compliance should prevail will be dismissed for failure to show "substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant." 43 CFR 4.1263(b); 30 U.S.C. § 1275(c) (1988).

APPEARANCES: Richard L. Fanyo, Esq., Denver, Colorado, for Kerr Coal Company; Cheryl A. Linden, Esq., for the Colorado Department of Natural Resources, Division of Minerals and Geology; and John S. Retrum, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Kerr Coal Company has appealed from a decision of Administrative Law Judge Ramon M. Child in Kerr Coal Co. v. Office of Surface Mining Reclamation & Enforcement, Docket No. DV-94-12-R, denying Kerr's Application for

Temporary Relief from Notice of Violation (NOV) No. 94-020-352-003. Along with its Notice of Appeal, Kerr filed Motions for Interim Temporary Relief, for Shortened Response Time and for Expedited Decision Thereon. The Colorado Department of Natural Resources, Division of Minerals and Geology (DMG), has filed a motion to intervene in this appeal. For reasons set forth below, we affirm the decision appealed.

Pursuant to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), on April 25, 1994, the Office of Surface Mining Reclamation and Enforcement (OSM) issued NOV No. 94-020-352-003 to Kerr for failing to restore a ridge to its approximate original contour at the Marr Strip Mine near Walden, Colorado.

Kerr filed applications with the Office of Hearings and Appeals for review of and temporary relief from the NOV. Kerr Coal Co. v. OSM, Docket No. DV-94-12-R. The matter was assigned to Administrative Law Judge Child for hearing, which was scheduled on July 20, 1994. Based upon a stipulation by the parties, on June 15, 1994, Judge Child entered an order granting temporary relief from the NOV from June 7, 1994, to and including August 23, 1994.

A hearing on the applications was held on July 20-22, 1994, before Judge Child in Denver, Colorado. During the hearing, Judge Child denied Kerr's oral motion to dismiss the proceeding on the ground that OSM lacked jurisdiction to issue the NOV directly to Kerr without first issuing a ten-day notice (TDN) to Colorado pursuant to 30 CFR 843.12(a)(2). At the conclusion of the hearing, Judge Child, from the bench, denied Kerr's oral motion to extend temporary relief from the NOV until he issued his decision. Kerr filed this appeal pursuant to 43 CFR 4.1101(a)(6) and 4.1267(b).

According to OSM's brief filed with the Board on August 26, 1994, the following facts are in evidence in the record. In 1980, DMG issued a permit to Kerr to mine coal from several open pits which included Pit No. 1, located in the area of a pre-SMCRA operation known as the Marr Strip. Pit No. 1, approximately 35 acres in area, is located mostly on lands owned by the United States and managed by the Bureau of Land Management. Kerr obtained the right to mine on Federal lands by virtue of a Federal coal lease.

According to OSM, "the most prominent pre-mining landform within Pit No. 1 was a continuous north-south running ridge," and "[t]he mining plan allowed Kerr to extract a near-vertical seam of coal running east-west through the ridge" (OSM Brief at 4). The extraction of this coal seam left a large east-west gap through the ridge. Kerr's 1980 plan called for reclamation of the north-south running ridge within Pit No. 1 to approximate original contour.

In 1990, due to worsening market conditions, Kerr decided to temporarily abandon further mining at the site, and submitted a revised mining plan to DMG which also revised plans to reclaim Pit No. 1. The revised plan, which was approved by DMG, permitted Kerr to leave the east-west valley

that bisects the north-south ridge. According to OSM, "[t]he valley * * * [measures] about 200 ft. deep, 2,500 ft. between ridgetops, and 2,000 ft. along its east-west floor," and "[eliminates] about 15 acres of a drainage flowing to the east of the ridge and * * * [adds] about 15 acres of new drainage flowing to the west of the ridge" (OSM Brief at 6). OSM maintains that the 3.5 million cubic yards of material needed to restore the ridge are available for reclamation. Id.

Coal extraction from the mine ceased in January 1993; in April 1994, Kerr applied for a Phase I bond release from DMG. Kerr sought partial release of its reclamation bond on grounds that it had substantially completed its backfilling and grading work at the mine.

Representatives from Kerr, DMG, and OSM's Albuquerque Field Office (AFO) met at the site on May 12, 1994, to determine whether the bond should be released. Because no variance had been sought or obtained, and because section 4.14.1(2) of the Colorado surface mining regulations require reclamation to approximate original contour unless a variance is obtained, OSM's inspector determined that Kerr was in violation of the Colorado regulatory program. During the inspection he requested DMG to either take enforcement action or to work with AFO to revise the permit to require reclamation to approximate original contour at the ridge. By letter dated May 18, 1994, DMG declined to take enforcement action, stating that it had acted appropriately. On May 25, 1994, OSM issued an NOV to Kerr, charging Kerr with a violation of section 4.14.1(2) of the Colorado program, and requiring reclamation of the disturbed area in Pit No. 1 within Federal lands to approximate original contour.

[1] Pursuant to section 525(c) of SMCRA and its implementing regulations, the Secretary of the Interior and his delegated representatives are authorized to grant temporary relief from an NOV where, among other things, the applicant for such relief shows that "there is a substantial likelihood that the findings and decision of the administrative law judge in the matters to which the application relates will be favorable to the applicant." 43 CFR 4.1263(b); Powderhorn Coal Co. v. OSM, 129 IBLA 22, 27 (1994), and cases cited. In addition, there must be a showing that granting the application for temporary relief will not have an adverse effect on public health or safety or cause significant, imminent environmental harm to land, air, or water resources. See 30 U.S.C. § 1275(c) (1988); 43 CFR 4.1263(c). Where temporary relief is not granted, a permittee is required to comply with a notice or order even while he is challenging its validity. 30 U.S.C. § 1275(a)(1) (1988).

Appellant argues that the Board should grant interim temporary relief because Kerr will be irreparably harmed if it is required to comply with the abatement order in the NOV pending a decision on its appeal, and because Kerr meets the criteria set forth in section 525(c) of SMCRA, 30 U.S.C. § 1275(c), as explained in Powderhorn Coal Co. v. OSM, supra.

OSM concedes that granting temporary relief in this case would not adversely affect public health or safety, and would not cause significant

environmental harm (OSM Answer at 1). OSM argues, however, that Kerr has not shown that "there is substantial likelihood that the findings of the Secretary will be favorable to * * * [it]." 30 U.S.C. § 1275(c)(2) (1988).

In Powderhorn Coal Co. v. OSM, supra at 28, the Board recently interpreted section 525(c)(2) as follows:

> Where the balance of hardship to the parties from not granting temporary relief tips decidedly in favor of the applicant, we find that in order to justify temporary relief it is not necessary that the applicant's right to prevail on the merits of the controversy be free from doubt where he "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation." Hamilton Watch Co. v. Benrus, 206 F.2d 738, 740 (2nd Cir. 1953), quoted in Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. at 905; Sierra Club, 108 IBLA 381, 384-85 (1989).

Assessment of Kerr's probability of success on the merits ultimately hinges on the question of whether OSM properly issued the NOV. Kerr argues (1) that OSM lacked authority to issue the NOV to Kerr without first issuing a TDN to DMG pursuant to 30 CFR 843.12(a)(2); (2) that OSM should have deferred to DMG's discretion in determining whether Kerr violated the Colorado program; (3) that Kerr complied with Colorado's interpretation of the requirement in section 4.14.1(2) to return lands to approximate original contour; and (4) that since DMG has not attempted to release the Phase I bond for the Pit No. 1 area without OSM's concurrence, there can be no violation of the approximate original contour standard.

Were the NOV issued for lands totally under state control, we would be inclined to agree with appellant's first argument. The NOV is issued, however, for lands under Federal control. As such, under section 523 of SMCRA, surface coal mining and reclamation operations are regulated under the Federal lands program. 30 U.S.C. § 1273 (1988). Under this program, OSM may delegate to a state with an approved state program primary authority to regulate surface coal mining and reclamation operations on Federal lands within its borders if OSM and the state enter into a cooperative agreement. 30 U.S.C. § 1273 (a) and (c) (1988).

The parties agree that mining on the Federal lands within Pit No. 1 was under jurisdiction of a cooperative agreement entered into between DMG and OSM on October 6, 1982, pursuant to section 523 of SMCRA. Appellant argues that this agreement insures that enforcement of surface mining laws and regulations shall be under state jurisdiction (Kerr Brief at 8). OSM, however, avers that the agreement provides, in Article VIII, para. 19:

> During any inspection made solely by OSM or any joint inspection where the * * * [DMG] and OSM fail to agree regarding the propriety of any particular enforcement action, OSM may take any enforcement action necessary to comply with 30 CFR parts 843 and

> 845. Such enforcement action shall be based on the performance standards included in the regulations of the approved Program [Colorado State Program] * * * .

This section of the agreement thus permits enforcement consistent with 30 CFR 843.12(a)(1), which provides:

> An authorized representative of the Secretary shall issue a notice of violation if, on the basis of a Federal inspection carried out during the enforcement of a * * * Federal lands program * * *, he finds a violation of * * * the applicable program * * * which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11.

Given the nature of its arguments--that state enforcement procedures and the state's interpretation of whether appellant is in substantial compliance prevail--appellant cannot show substantial likelihood of success on the merits where language in a cooperative agreement between Colorado and OSM governing surface mining regulation on Federal lands clearly indicates that OSM may take Federal enforcement action pursuant to the Federal lands program, where the State and OSM cannot agree on the propriety of any particular enforcement action. Furthermore, appellant has not provided any definitive authority which supports a finding of substantial likelihood of success on the merits concerning its argument that as long as DMG does not release the Phase I bond, OSM may not enforce under the Federal lands program.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, Kerr's application for interim temporary relief is denied; its motion to shorten OSM's response time is denied as moot; its motion for expedited consideration is granted; and the decision by Judge Child denying Kerr's application for temporary relief is affirmed. For good cause shown, DMG's motion to intervene is granted.

John H. Kelly
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge